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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

WILLIE C. ACKER,
Appellant,

vs.

BOARD OF TRUSTEES OF PASS CHRISTIAN
MUNICIPAL SEPARATE SCHOOL DISTRICT,
Respondents.

ON APPEAL FROM THE SUPREME COURT
OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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No. ____

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Pass Christian (Mississippi) School Board, after an administrative hearing, made a final decision not to rehire Willie C. Acker as a teacher on June 27, 1974. This decision was appealed to the Chancery Court of Harrison County, Mississippi, pursuant to the Mississippi Fair Dismissal Act, and

after a hearing de novo, the Chancellor entered an opinion (unreported), dated August 26, 1974, which reversed the decision of the school board. The school board appealed to the Mississippi Supreme Court, which reversed the decision of the Chancellor in an opinion reported at 326 So.2d 799, dated February 17, 1976, and remanded the case to the Chancellor for further consideration. The Chancellor in a second opinion (unreported), dated November 30, 1976, then affirmed the original decision of the Pass Christian School Board not to rehire Mr. Acker. On appeal by Mr. Acker, this decision was affirmed by the Mississippi Supreme Court without opinion and the Petition for rehearing was denied by the Mississippi Supreme Court en banc, also without opinion with judgment entered on

April 26, 1978. 357 So.2d 292 (Miss. 1978).

JURISDICTION

The judgments of the Mississippi Supreme Court sought to be reviewed were entered on February 17, 1976, and April 26, 1978. Notice of appeal was filed with the Mississippi Supreme Court on May 3, 1978.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257 (2), as an appeal which draws into question the validity of the Mississippi Public School Fair Dismissal Act (Miss. Code Ann. Sections 37-9-101 through 37-9-113 (Supp. 1974), 1974 Supplement to Volume 10, Pages 55-59), which became effective April 25, 1974, and which, as amended, is now the School Employment Procedures Law of 1977, Mississippi Code of 1972, Sections 37-9-101 through 37-9-113 (Supp.

1977), 1977 Supplement to Volume 10, Pages 66-71, (effective July 1, 1977), infra, Pages 10-17), on the ground that it is repugnant to the Fourteenth Amendment to the Constitution of the United States.

The appellants also contend that the judgment is founded on other errors which though they may involve questions not subject to review by this Court on appeal, nevertheless deprived the appellants of a fair hearing and constituted a denial of due process of law and a denial of the equal protection of the law in violation of the Fourteenth Amendment. These errors are included in the statement of the questions presented by this appeal, hereinafter set forth. If it were not for the invalidity of the Mississippi Fair Dismissal Act which allows or requires these

errors, the appellants would be limited as to these errors to a petition for writ of certiorari, under 28 U.S.C. Section 1257(3). They are included in this appeal under the authority of Prudential Insurance Co. v. Check, 259 U.S. 530, 547 (1921), and Flournoy v. Weiner, 321 U.S. 253, 263 (1943).

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. Section 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States. This case also involves the validity of the Mississippi Public School Fair Dismissal Act, Sections 37-9-101

through 37-9-113 of the Mississippi Code of 1972 (Supp. 1974), 1974 Supplement to Volume 10, which reads as follows:

37-9-101: Citation of Sections 37-9-101 through 37-9-113.

Section 37-9-101 through 37-9-113 shall be known as and cited as the "Public School Fair Dismissal Act."

37-9-103: Definition.

As used in sections 37-9-101 through 37-9-113 the word "employee" shall include any teacher, principal, superintendent elected by a board of trustees, and other professional personnel employed by any public school district of this state and required to have a valid certificate issued by the state department of education as a prerequisite of employment.

37-9-105: Persons entitled to notice.

Any employee of a school district who has been employed by such district during the entirety of the preceding school year, shall be given notice within seven (7) days of the decision that he not be offered a contract for reemployment for the succeeding school term when:

(a) By January 15 the board of trustees of the school district does not reemploy the superintendent;

(b) By February 15 the superintendent of a school district does not recommend the reemployment of a principal or by March 1 the board of trustees of the district does not approve the recommendation of the superintendent for the reemployment of a principal; or

(c) By April 1 the principal does not recommend to the superintendent the reemployment of a teacher, or by May 1 the principal does recommend the reemployment of a teacher and the superintendent does not approve the recommendation for the teacher's reemployment, or by May 1 the principal and superintendent both recommend the reemployment of a teacher and the board of trustees of the district declines the recommendation.

37-9-107: Notice.

Except in the case of nonreemployment of the superintendent, notice shall be tendered by the superintendent to any employee within seven (7) days of the date when the recommendation to reemploy would have been made under the terms of sections 37-9-15 and 37-9-17 and amendments thereto.

In the case of the superintendent who is not offered a contract for reemployment by January 15 or other date set by section 37-9-13, Mississippi Code of 1972, the president of the board of trustees

shall tender notice to such superintendent within seven (7) days of the date of the board's decision.

The notice shall be mailed by certified mail, return receipt requested.

37-9-109: Rights of employee.

An employee entitled to notice under section 37-9-105 shall be entitled to:

(a) Receive a written statement of the reasons that he shall not be offered a new contract with facts supportive of those reasons upon requests;

(b) Request a public hearing before the board within seven (7) days after receipt of the notice;

(c) Receive a fair and impartial hearing before the board within fourteen (14) days from the date of receipt of the notice from the employee requesting a hearing;

(d) Be represented by legal counsel, at his own expense.

If the employee does not request a hearing, the decision of the board with regard to the reemployment of the employee shall be final.

37-9-111: Hearing.

The board shall, upon receipt of a request for a hearing from the

employee, set the time, place and date of such hearing, and inform the employee of same by registered mail return receipt requested. The hearing shall be conducted under rules of the board which shall embody due process of law and fairness for both parties. The board shall cause to be made a complete and accurate record of the proceedings of the hearing which shall be transcribed, and a copy shall be made available to the employee upon request provided that a charge for the copy not in excess of reporter's fees under section 9-13-33, Mississippi Code of 1972, may be asserted the employee.

The board shall notify the employee in writing of the decision of the board within seven (7) days after the date of completion of the hearing.

37-9-113: Appeals.

Any employee aggrieved by the board's final decision shall have the right to appeal such decision, within thirty (30) days after receipt of the board's decision to the appropriate chancery court in the manner provided in section 11-5-79, Mississippi Code of 1972. Such hearing before the Chancery Court shall be de novo. An appeal to the Supreme Court in a manner provided by law may be taken from the decision of the chancery court.

The Mississippi Public School Fair Dis-

missal Act has since been amended by the School Employment Procedures Law of 1977, Sections 37-9-101 through 37-9-113, Mississippi Code of 1972 (Supp. 1977) 1977 Supplement to Volume 10, page 66. However, such amendments have failed to cure the constitutional defects inherent in the Public School Fair Dismissal Act. The School Employment Procedures Law of 1977 reads as follows:

> 37-9-101: Short title; declaration of legislative intent.
> Sections 37-9-101 to 37-9-113 shall be known as and cited as the "School Employment Procedures Law of 1977."
> It is the intent of the legislature to establish procedures for providing public school employees with notice of the reasons for not offering an employee a renewal of his contract, to provide an opportunity for the employee to present matters in extenuation or exculpation to enable the board to determine whether the recommendation of nonemployment is a proper employment decision and not contrary to law, and not to establish a system of tenure

> or require that all decisions of nonreemployment be based upon cause with respect to employment in the school district.

37-9-103: Definition.

As used in sections 37-9-101 through 37-9-113 the word "employee" shall include any teacher, principal, superintendent elected by a board of trustees, and other professional personnel employed by any public school district of this state and required to have a valid certificate issued by the state department of education as a prerequisite of employment.

37-9-105: Written notice of determination not to offer employee renewal contract shall be given; time therefor.

In the event that a determination is made by a school district not to offer an employee a renewal contract for a successive year, written notice of nonrenewal shall be given within seven (7) days of the date when the recommendation to reemploy would have been made under the provisions of sections 37-9-15 and 37-9-17, and amendments thereto, but in any event no later than the following:

(a) If the employee is a superintendent, the school district shall give notice of nonreemployment on or before February 1;

(b) If the employee is a principal, the school district shall give notice of nonreemployment on or before March 1;

(c) If the employee is a teacher, or other professional educator, the school district shall give notice of nonreemployment on or before April 8.

37-9-107: Repealed.

37-9-109: Rights of employee.
An employee who has received notice under section 37-9-105, upon written request, shall be entitled to:

(a) Written notice of the reasons for nonreemployment, together with a summary of the factual basis therefor, which notice shall be given at least five (5) days prior to any hearing;

(b) An opportunity for a hearing at which to present matters relevant to the reasons given for the nonreemployment decision, including any reasons alleged by the employee to be the reason for nonreemployment;

(c) Receive a fair and impartial hearing before the board or hearing officer;

(d) Be represented by legal counsel, at his own expense.

If the employee does not request a hearing, the decision of the board with regard to the reemployment of the employee shall be final.

37-9-111: Hearing.
(1) The school board, upon request for a hearing from an employee under the terms of sections 37-9-101 to 37-9-113, shall set the time, place and date of such hearing and notify the employee in writing of same. The date shall be set not sooner than five (5) days nor later than thirty (30) days from the date of the request, unless otherwise agreed. The hearing may be held before the board or before a hearing officer appointed for such purpose by the board, either from among its own membership, from the staff of the school district or some other qualified and impartial person, but in no event shall the hearing officer be the staff member responsible for the initial decision of nonreemployment.
(2) The employee shall be afforded an opportunity to present matters at the hearing relevant to the reasons given for the nonreemployment determination and to the reasons the employee alleges to be the reasons for nonreemployment and to be represented by counsel at such a hearing. Such hearing shall be conducted in such a manner as to afford the employee a fair and reasonable opportunity to present witnesses and other evidence pertinent

to the issues in his behalf and to cross-examine witnesses against the employee. The board or the hearing officer may require any portion of the evidence to be submitted in the form of depositions or affidavits, and in case affidavits are received, an opportunity to present counter-affidavits shall be provided.

(3) The board shall cause to be made stenographic notes of the proceedings. In the event of a judicial appeal of the board's decision, the entire expense of the transcript and notes shall be assessed as court costs.

(4) The board shall review the matters presented before it, or, if the hearing is conducted by a hearing officer, the record of the proceedings and, based solely thereon, conclude whether the non-reemployment determination is a proper employment decision, and shall notify the employee in writing of its final decision and reasons therefor. Such notification shall be within thirty (30) days of the conslusion of the hearing if the hearing is conducted by a hearing officer and within ten (10) days of the conclusion of the hearing if the hearing is initially conducted by the board. If the matter is heard before a hearing officer, the board shall also grant the employee the opportunity to appear before the board to present a statement in

his own behalf, either in person or by his attorney, prior to a final decision by the board.

(5) In conducting a hearing, the board or hearing officer shall not be bound by common law or by statutory rules of evidence or by technical or formal rules of procedure except as provided in sections 37-9-101 to 37-9-113, but may conduct such hearing in such manner as best to ascertain the rights of the parties; provided, however, hearsay evidence, if admitted, shall not be the sole basis for the determination of facts by the board of hearing officer.

(6) In the event the decision of the school board is in favor of the employee, the board shall have the authority to order the execution of a contract with the employee for an additional period of one (1) year.

(7) For purposes of conducting hearings under sections 37-9-101 to 37-9-113, the board or hearing officer shall have the authority to issue subpoenas for witnesses and to compel their attendance and the giving of evidence. Any expense connected therewith shall be borne by the party requesting the subpoenas, which shall include an appearance fee for each witness so subpoenaed not inconsistent with state laws governing payments to witnesses. In the event it is necessary to enforce or to quash a subpoena issued to compel the

the attendance of a witness, application shall be made with the chancery court of the county where the school board is located.

37-9-113: Appeals.

(1) Any employee aggrieved by a final decision of the school board is entitled to a judicial review thereof, as hereinafter provided.

(2) An appeal may be taken by such employee to the chancery court of the judicial district in which the school district is located, by filing a petition with the clerk of that court and executing and filing bond payable to the school board with sufficient sureties, in the penalty of not less than two hundred dollars ($200.00), conditioned upon the payment of all of the costs of appeal, within twenty (20) days of the receipt of the final decision of the board.

(3) The scope of review of the chancery court in such cases shall be limited to a review of the record made before the school board or hearing officer to determine if the action of the school board is unlawful for the reason that it was:

(a) Not supported by any substantial evidence;

(b) Arbitrary or capricious; or

(c) In violation of some statutory or constitutional right of the employee.

(4) No relief shall be granted based upon a court's finding of harmless error by the board in complying with the procedural requirements of sections 37-9-101 to 37-9-113. However, in the event that there is a finding of prejudicial error in the proceedings, the cause shall be remanded for a rehearing consistent with the finding of the court.

(5) Any party aggrieved by action of the chancery court may appeal to the Supreme Court in the manner provided by law.

QUESTIONS PRESENTED

1. WHETHER THE MISSISSIPPI PUBLIC SCHOOL FAIR DISMISSAL ACT, SECTIONS 37-9-101 THROUGH 37-9-113, MISSISSIPPI CODE OF 1972 (SUPP. 1974), WHICH FAILS TO PROVIDE FOR A FAIR AND IMPARTIAL HEARING, VIOLATES THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

2. WHETHER THE APPELLANT HAS BEEN DENIED DUE PROCESS BECAUSE COUNSEL FOR THE APPELLEE SERVED A DUAL ROLE AS PROSECUTOR FOR THE PRINCIPAL AND AS COUNSEL TO THE DECISION-

MAKING BOARD.

3. WHETHER THE APPELLANT WAS DENIED DUE PROCESS IN THAT THE PASS CHRISTIAN SCHOOL BOARD WAS NOT AN IMPARTIAL DECISION MAKER.

4. WHETHER THE BOARD'S FAILURE TO ARTICULATE THE REASONS FOR DISMISSAL AND THE EVIDENCE SUPPORTING THOSE REASONS DENIED APPELLANT DUE PROCESS.

STATEMENT OF THE CASE

Although the appellant, Willie C. Acker, a black man teaching at a formerly all-white high school, had received on March 5, 1974, an "above average" evaluation (R. 60, 61), on March 7, 1974, Mr. Acker was notified by this principal that the principal would not recommend Mr. Acker for reemployment as a teacher for the 1975-76 school year. (R. 63) Two reasons for non-recommendation were alleged at that time - namely, using a ladies restroom and taking four

students to New Orleans without permission. (R. 64) On March 7, 1974, Mr. Acker expressed a desire to appear before the school board. (R. 64)

Two days later, without benefit of counsel or other elements of due process, Mr. Acker met in executive session with the school board. (R. 68)

Then Mr. Acker, in writing, requested a hearing before the board, which on April 3, 1974, refused to permit the hearing. (R. 68) By letter from the superintendent dated April 4, 1974, Mr. Acker was informed of the denial of a hearing and of the board's finding that it did not have the power to rehire Acker in any event. (R. 52)

On April 18, 1974, Mr. Harlin Hall, Mr. Acker's principal, tendered his resignation to the Board, effective at the end of the school year. (R. 70)

Meanwhile, on April 12, 1974, Mr. Acker's counsel had sent another written request for a hearing. (R. 53) This request for a hearing was considered on April 18, 1974, by the board, which referred the letter to its attorney for recommendation. (R. 71)

At its April 25, 1974, meeting, the board was advised of the new statute, Sections 37-9-101 through 113, Miss. Code of 1972 (Supp. 1974) and decided to grant Mr. Acker a hearing. (R. 73) On the same night, the board elected a new principal for the 1974-75 school year for the high school where Mr. Acker was teaching. (R. 73) This point is relevant because, according to Section 37-9-17, Miss. Code of 1972, only the principal can initiate the recommendation of teachers for employment. Although the old principal had resigned, the record does not reflect any attempt

by the board to refer Mr. Acker to the new principal for consideration of a recommendation.

On May 2, 1974, the board set a hearing date for Mr. Acker. (R. 75) The date set for the hearing was May 21, 1974. On May 3, 1974, the superintendent sent a letter to Mr. Acker notifying him of the hearing. (R. 54)

On May 21, 1974, the Board met again. The minutes of the meeting reflect a review of procedures for the Acker hearing but the "procedures" are not stated. (R. 77)

Later on May 21, 1974, Mr. Acker's new counsel, who had just been retained, requested a continuance of the hearing and requested a statement of the reasons for the non-renewal of Mr. Acker's contract. (R. 78)

By letter from the board's attorney,

dated May 24, 1974, Mr. Acker was informed of the new date for the hearing, June 3, 1974, (R. 55), and Mr. Acker was also informed of four reasons for his non-renewal. (R. 56) It should be noted that these reasons are stated in language different from the earlier notice from the now-resigned principal, and two of the reasons (reasons numbers 3 and 4) did not appear on the earlier notice. (R. 64)

On June 3, 1974, a hearing was conducted by the Board. Counsel for Mr. Acker, conducted a voir dire of the board. (R. 15, 16) After the voir dire, Mr. Acker's counsel objected (R. 17, 18) to the proceedings on a number of due process grounds, including that the board was not an impartial tribunal, that the board's attorney was simultaneously acting as the principal's advocate serving as the prosecutor, that

the hearing was too late and untimely (not counting the short continuance), that the reasons given for the non-renewal were given untimely, that the specific notice, hearing, and certified mail requirements of the new statute, Sections 37-9-107 through 111, Miss. Code of 1972, (Supp. 1974), were violated, and that the whole procedure violated the minimum elements of fairness protected by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (R. 17,18)

The board rendered a decision on June 27, 1974, not to reemploy Mr. Acker, without articulating the reasons or citing the evidence supporting the board's decision. (R. 84)

Thereafter, Mr. Acker appealed to the Chancery Court of the First Judicial Dis-

trict of Harrison County, Mississippi, under the then new statute, Section 37-9-113, Miss. Code of 1972 (Supp. 74). (R. 2)

Since the hearing on appeal was to be a hearing de novo, Mr. Acker filed a Bill of Complaint (R. 2, 3), contending that the Board had violated numerous procedural and substantive legal rights of the Appellant protected by state and federal law.

The Chancellor granted a motion to strike the Bill of Complaint. (R. 3)

After a full hearing, the Chancellor entered an opinion (R. 85) and a Final Decree (R. 85), requiring the board to rehire Mr. Acker.

The Board appealed the decision of the Chancellor, and the teacher, Mr. Acker, filed a cross-appeal only on the issue of striking the Bill of Complaint.

The Supreme Court of Mississippi on the appeal by the board reversed and remanded but affirmed on cross-appeal the striking of the Bill of Complaint. Board of Trustees of Pass Christian Municipal Separate School District v. Acker, 326 So. 2d 799 (Miss. 1976).

On remand the Chancellor affirmed the Board. (R. 85-87) The teacher, Mr. Acker, then appealed to the Mississippi Supreme Court which affirmed, without opinion, the decision of the Chancellor on March 8, 1978, and en banc denied, without opinion, the appellant's petition for rehearing on April 26, 1978. Acker v. Board of Trustees of Pass Christian Municipal Separate School District, 357 So.2d 292 (Miss. 1978).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On his first appeal to Chancery Court in 1974, following an adverse determination by

the school board, Willie Acker assigned as error the failure of the school board to articulate reasons for the non-renewal of his contract, the unfairness of the school board's hearing counsellor simultaneously serving as the prosecutor for the accusing principal, and the absence of an impartial decision maker for the administrative hearing. The appellant also complained of other constitutional infirmities inherent in the school board determination in a Bill of Complaint filed for this de novo hearing before the Chancery Court. The Chancery Court granted a motion to strike the Bill of Complaint and although its decision on the merits was favorable to appellant, that decision was based on the failure of the school board to comply with the procedural requirements of the Public School Fair Dismissal Act, and the Constitutional questions

were not considered.

When the school board appealed the decision of the Chancery Court to the Mississippi Supreme Court, Willie Acker cross-appealed as to the Chancery Court's order striking his Bill of Complaint, claiming the Chancery Court should have applied federal law to the case. The Chancery Court's action in striking Willie Acker's Bill of Complaint was affirmed with the following language:

> Dealing first with the cross-appeal, we hold that the Chancellor correctly refused to permit the filing of a new and original suit in the pending appeal case and in striking the bill. The case, on cross-appeal, is affirmed.

Board of Trustees of Pass Christian Municipal School District v. Acker, 326 So.2d 799, 800 (Miss. 1978). On direct appeal, the State Supreme Court reversed and remanded the case, ruling that a trial de novo

by the Chancery Court on appeal from an administrative agency violated the Mississippi Constitutional separation of powers. 326 So.2d at 801. No ruling was made on the alleged violations of the United States Constitutional law.

On remand of the case to the Chancery Court, Willie Acker again complained, through briefs and oral arguments, of constitutional violations in the hearing process, including the state statute's repugnance to the Fourteenth Amendment to the Constitution of the United States. The Chancery Court in its opinion found that the school board "did not unconstitutionally violate the rights of others or the complaining party." (Appendix p. 70). With this brief statement, the constitutional infirmities of the state statute and other violations of federal law alleged by the

appellant, Willie C. Acker, were summarily dismissed. The Chancery Court proceeded to affirm the original decision of the school board not to rehire Mr. Acker.

The appellant again raised these federal Constitutional issues in his subsequent appeal to the Mississippi Supreme Court, through assignments of error, briefs, and oral argument, and in his petition for rehearing before that Court. Further, in his petition for rehearing, Willie Acker asked that the court at least "certify in a final opinion that it has passed on these federal questions, in order to permit the appellant to seek an appeal or certiorari to the Supreme Court of the United States." The Mississippi Supreme Court, however, affirmed the decision of the Chancery Court and denied appellant's petition for rehearing without opinion. Acker v. Board of

Trustees of Pass Christian Municipal Separate School District, 357 So.2d 292 (Miss. 1978).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The following federal Constitutional questions should control the decision of this case, notwithstanding that subordinate state issues have been decided by the State Courts in favor of the School Board. A proper decision of these federal questions would result in the rendering of an order in favor of the appellant, Willie Acker.

1. THE PUBLIC SCHOOL FAIR DISMISSAL ACT, SECTIONS 37-9-101 THROUGH 37-9-113, MISSISSIPPI CODE OF 1972 (SUPP. 1974), IS REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

"The Public School Fair Dismissal Act," Sections 37-9-101 through 113, Miss. Code of 1972, (Supp. 1974), failed to provide

the teacher herein with due process of law and the equal protection of the law as protected by the Fourteenth Amendment to the Constitution of the United States in that it failed to grant school boards the power after a hearing to overrule the principal or superintendent's negative recommendation; it failed to require a pre-termination hearing; it failed to require the school boards, after a hearing, to state in a written notice to the teacher, the reasons for a board's decision of nonrenewal with evidence supporting the board's decision; it permitted school boards to hear cases in which members of the board had either a personal stake, conflict, bias or prejudice; it failed to state any measurable standard for renewal of teacher's contracts by which the substantiality of evidence could be tested; it permitted an administrative

agency to exercise a judicial function; it failed to prohibit the attorney for the principal from serving as counsel for the school board during the conduct of the hearing. Cf., Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970), affirmed 408 U.S. 593 (1972); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Goldberg v. Kelly, 397 U. S. 254, at 267, 268, and 271 (1970).

Mr. Acker was not advised at all of his termination in sufficient detail to fairly enable him to show error prior to the initial (and in reality the actual) decision by the school board in this case, which was made long before the letter of May 24, 1974, cited by the appellee. The real decision by the school board was made summarily and secretly on March 24, 1974, (R. 68), long before the hearing.

Although the letter of May 24, 1974,

(R. 56) allegedly gave the principal's reasons for non-renewal, the principal had not stated reason 3 and 4 in his written earlier statement. (R. 64) Incredibly, by the time reasons 3 and 4 appeared on the school board attorney's letter of May 24, 1974, (R. 56), the principal had resigned (R. 70). So, whose reasons are these reasons 3 and 4? How can one show error when one does not even known the source of the accusation?

The causes of termination must be articulated by the board after the hearing, but, the board's advice to Mr. Acker of the causes or reasons for the final decision of termination were never communicated to him. (R. 84)

Since the state statute on its face and as applied in this case failed to require these minimum elements of due process, it

is repugnant to the Fourteenth Amendment to the Constitution of the United States.

2. THE APPELLANT HAS BEEN DENIED DUE PROCESS BECAUSE COUNSEL FOR THE APPELLEE SERVED A DUAL ROLE AS PROSECUTOR FOR THE PRINCIPAL AND AS COUNSEL TO THE DECISION-MAKING BOARD.

It is incompatible with due process for the school board attorney to act in the dual capacities of counsel to the tribunal and proponent of the school principal's charges against the teacher. It is well settled that due process requires that the tribunal have the appearance and substance of impartiality. E.g., Goldberg v. Kelly, supra at 271; Ferguson v. Thomas, supra at 856 (5th Cir. 1970). Where the board serves both as the trier of fact and prosecutor, there are "obvious defects in the fact-finding process occasioned by the

(School) Board's multiple functioning vis-a-vis the Teacher." Pickering v. Board of Education, 391 U. S. 563, 578-79, n. 2 (1968).

Due process is denied when, as here, the tribunal's advisor also serves as prosecuting attorney. Muller v. Board of Education, 200 N.E. 2d 838, 846-48 (Ill. App. 1964). Mack v. Florida State Board of Denistry, 296 F.Supp. 1259, 1263 (S.D. Fla. 1969), aff'd in part, 430 F. 2d 862 (5th Cir. 1970); State ex rel. Ball v. McPhee, 94 N.W. 2d. 711, 721-11 (Wis. 1959). Horn v. Township of Hill-town, 337 A.2d 858 (Pa. S. Ct. 1975); Appeal of Robert Feldman, 346 A. 2d 895 (Pa. Comwelth. 1975); Monahan v. Bd. of Trustees, 486 P. 2d 235, 238 (Wyo. 1971).

The principal's prosecutor (one and the same as the board's attorney) participated

in the deliberations on substantive and procedural issues throughout the many months that the board considered this case. The record shows the board's attorney acting as follows:

1. He instructed the board regarding voir dire. (R. 15)

2. He defended the board's activities at previous meetings as described in the voir dire. (R. 17)

3. He responded to the objections to the proceedings entered by Acker's counsel before the board, and then he advised the board on how it should rule on the objections, suggesting that he would review the applicable law later for the board. (R. 19-20) Nowhere in the record thereafter is there any indication that the board was ever advised of the applicable law, nor is there even any indication that the

board ever again (after the board hearing on June 3, 1974) discussed or voted on these objections of Acker's counsel.

4. He then called witnesses and examined them on direct examination in presentation of the principal's direct case against the teacher. (R. 20-50)

5. He advised the board about taking a recess. (R. 34)

6. Prior to the June 3, 1974, board hearing, he had written the letter for the board giving the written reasons for non-renewal of Mr. Acker's contract (R. 55-56), even though the Fair Dismissal Act, Section 37-9-101, Miss. Code of 1972 (Supp. 1974) directed the superintendent to send the notice with the reasons as required by Section 37-9-109, Miss. Code of 1972 (Supp. 1974).

7. He objected to a motion to strike

testimony and allowed the Board to continue without ruling on the motion. (R. 65)

8. He advised the board on when and how they could decide the case. (R. 66)

9. Before the board hearing on June 3, 1974, he participated in giving the board advice on legal problems associated with the case, including whether the board had the power to rehire when there was no recommendation from a principal, as well as other procedural and substantive points, as reflected in the letters and minutes of the board. (R. 62, 65-66, 68, 71, 73, 75, 77, 78, 80.)

The U. S. Supreme Court in Morgan v. United States, 304 U. S. 1, 19-20 (1937), made clear that such procedures by administrative agencies or courts fail to meet the requirements of due process. In Morgan, the Secretary of Agriculture, after an

ostensibly "full hearing," delegated to the attorneys for the prosecution the task of preparing the decision. The Supreme Court held that this hearing was fatally defective for it lacked "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." Id. at 19. The Court said:

> If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred ex parte with plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking of consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. Id. at 19-20.

The hearing and decision of the school board in Mr. Acker's case were tainted by the board's prejudgment of the case on March 14, 1974, and its ex parte reliance on the prosecutor (a) in setting procedures (R. 77,80) and reasons for termination (R. 55-56), (b) on his advice during the conduct of the hearing, (R. 3, 15, 17, 19, 20, 34, 65-80), and (c) in his participation in the final unarticulated decision as school board attorney. In the Judicial Branch, such contact is considered incurable error. How, then, can the same conflicting relationships foster justice and due process in the decision-making process of a quasi-judicial executive branch agency?

3. THE APPELLANT WAS DENIED DUE PROCESS IN THAT THE PASS CHRISTIAN SCHOOL BOARD WAS NOT AN IMPARTIAL DECISIONMAKER.

When procedural due process is required,

"an impartial decisionmaker is essential." Goldberg v. Kelly, supra at 271. The Courts uniformly have applied this requirement in teacher dismissal cases. Simard v. Board of Education of Town of Groton, 473 F. 2d 988, 993 (2nd Cir. 1973); Ferguson v. Thomas, supra at 856.

The Courts have recognized that impartiality is lacking if the decisionmaker is hostilely motivated toward the employee for reasons extrane us to those which are the subject of the hearing, or if the decisionmaker has prejudged the issues which are the subject of the hearing. See, e.g., Pickering v. Board of Education, 391 U. S. 563 at 578-579 n.2. (1968). In the instance case, both defects are apparent.

Initially, the board turned down Mr. Acker's first request for a hearing. (R. 52, 68)

Secondly, each of the board members during voir dire admitted that they had discussed the case with the superintendent and/or the board's attorney prior to the June 3, 1974, hearing. (R. 15-16)

Even worse, the school board's minutes of March 14, 1974, (R. 68) April 3, 1974, (R. 68) April 18, 1974, (R. 71) April 25, 1974, (R. 73) and May 2, 1974 (R. 75) reflect discussion of Mr. Acker's case by board members. These minutes contradict each of the board members' testimony (R. 15, 16) that the May 21st meeting was their only discussion of the Acker matter. Such a contradiction destroys the integrity of the board as an impartial decisionmaker. It strains credulity to assume that the board did not really form opinions and decisions about this case after six meetings during the two and one-half months before

the June 3rd hearing, especially in light of the case being known to the community through an early newspaper article. (R. 16) It is an ever greater strain on credibility to accept the board's testimony on voir dire to mean they forgot about those other five meetings on this case. They had, in fact, already decided they did not even have the power to hire him. (R. 52)

Even at the June 3, 1974, board hearing, the counsel for the board (prosecutor for the principal) attempted to discredit Acker before the board by reminding the board of their meeting on March 14, 1974, where Acker said things the counsel for the board characterized as contradictory. (R. 65)

The impatience of the board was exposed by comments made by Mr. Stallings. (R. 34)

The failure to discuss objections entered by Acker's counsel (R. 20) and the

failure even to rule on the motion by Acker's counsel to strike certain testimony (R. 65), give further indication of the partiality of the board in this case.

The personal stakes by the board and its attorney in the reasons for non-renewal (R. 55, 56) and the personal bias (R. 68, 71, 73, 75) and pre-judgment (R. 52, 68, 71, 73, 75) of those reasons, as well as the initial summary decision not to renew (R. 52) followed by the lack of honesty in the board not admitting all its prior discussion of this case to Acker's counsel on voir dire (R. 15, 16), are the kinds of bias and lack of due process which show that the decision of the board was infected by bias and prejudgment not consistent with standards of honesty and integrity in due process as described in Withrow v. Larkin,

421 U. S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) and Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U. S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976).

4. THE BOARD'S FAILURE TO ARTICULATE THE REASONS FOR DISMISSAL AND THE EVIDENCE SUPPORTING THOSE REASONS DENIED APPELLANT DUE PROCESS.

Due process requires that, if the decisionmaker determines to take adverse action following the hearing, it must "state the reasons for (its) determination and indicate the evidence (it) relied on." Goldberg, supra at 271. As explained in Goldberg, the reason for this requirement is to assure that the decisionmaker has complied with its obligation to predicate the decision "solely" on the legal rules and evidence adduced at the hearing." Goldberg, supra

at 271. As explained in Goldberg, the reason for this requirement is to assure that the decisionmaker has complied with its obligation to prodicate the decision "solely on the legal rules and evidence adduced at the hearing." Goldberg, supra at 271. See, Morrissey v. Brewer, 92 S. Ct. 2593, 2603 (1972).

After the June 3, 1974, hearing, the minutes of the school board reflect the failure of the school board to state the basis for its decision (R 84). Nowhere else in the record has the board shown its reasons, after the hearing, for its decision. How, then, can the board assert that it has complied with its obligation to predicate its decision "solely on the legal rules and evidence adduced at the hearing?" Goldberg, supra at 271.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

WILLIE C. ACKER

BY: _____
Gerald Blessey,
Counsel for Appellant

Paul Minor, Co-Counsel for Appellant

BLESSEY & MINOR ATTORNEYS
Post Office Drawer L
Biloxi, Mississippi 39533

CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, which lists the persons served with copies of this Jurisdictional Statement and its Appendix, service has been made upon all parties of record.

_____
Gerald Blessey, Counsel for Appellant

APPENDIX

AUGUST 26, 1974

IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

IN VACATION 1974

WILLIE C. ACKER	APPELLANT,
VS.	NO. 65,295,
BOARD OF TRUSTEES OF THE PASS CHRISTIAN MUNICIPAL SEPARATE SCHOOL DISTRICT	APPELLEE.

OPINION OF THE COURT

This matter was heard by the Court under Mississippi's new statute, Chapter 577 of the General Laws of Mississippi, 1974 Regular Session (Senate Bill No. 2108), which became law on April 25, 1974, without approval of the Governor, and pursuant to Section 7 thereof, viz:

> "Appeals. Any employee aggrieved by the board's final decision shall have the right to appeal such decision, within thirty (30) days after receipt of the board's decision, to the appropriate Chancery Court in the manner provided in Section 11-5-79, Mississippi Code of 1972."

There appears to be no contention that the appeal to this Court or the procedure followed in reaching this Court is error, however, there is streniously presented alleged grevious errors in the procedure followed by the Board of Trustees of the Pass Christian Municipal Separate School District, appellee herein, hereinafter referred to as the "school board" in the procedure before it as to due process, notice, etc.

Realizing that this is a case of first impression under the above-referred to new statute as far as the school board and this Court is concerned, nevertheless, the laws or statutes in effect must be followed. This Court is of the opinion that the

school board failed to follow the law in the particulars hereinafter discussed and that their decision to dismiss the appellant in this case must be reversed procedurally if for no other reason.

I.

As stated above, Chapter 577 of the General Laws of Mississippi, 1974 Regular Session, became law on April 25, 1974. Although the appellant contends that due process and the equal protection of the law are constitutional rights guaranteed to him with or without this new statute, and the Court agrees with this, the school board also failed to follow the procedures outlined in the new statute. The Court is bound to say that from reading the record in this case (whether it be an appeal or trial de novo) it is apparent that the school board attempted with all

diligence to comply with this new law in conducting the hearing and complying with the procedures outlined therein, however, this Court is of the opinion that this new statute must be strictly construed and followed to the letter. Particularly is this true of a new statute and a case of first impression thereunder where we have no guidelines or precedents furnished by previously decided and reported cases.

II.

The notice of non-renewal was untimely. Section 8 of the new statute states:

> (Any superintendent, principal, teacher or employee who shall be entitled to notice under the provisions of this act, during the school year 1973-74, may be given such notice within thirty (30) days after the effective date of this act." (underscoring mine)

The act became effective on April 25, 1974. The first notice sent under the procedure specified by the act was dated

May 24, 1974, it appearing that on May 3, 1974, the superintendent wrote a letter to appellant granting a hearing before the school board but this letter was not "by registered mail return receipt requested," nor were the reasons "that he shall not be offered a new contract with facts supportive of those reasons" given as specified in the act. (Sections 5 and 6) Counting the effective date of the act, April 25, 1974, the notice given dated May 24, 1974, was not "within thirty (30) days after the effective date of this act", but was thirty (30) days and since the same was in letter form and marked "certified mail return receipt requested" it must be assumed that the same was not received by the appellant until at least the next day. If the date of April 25, 1974, is not counted in computing the "within thirty (30)

days" then May 24, 1974, would be twenty-nine (29) days and within the thirty (30) days but the notice could not have been received by the appellant until the next day or possibly two or three days, since May 24, 1974, was a Friday.

In addition, Section 4 of the act requires the notice to be tendered "by the superintendent" but the letter notice of May 24, 1974, was in fact tendered by the attorney for the school board.

III.

The hearing granted under Section 5(c) was untimely because it was granted more than fourteen (14) days from the date of receipt of appellant's request. Section 5(c) states:

> "An employee entitled to notice under Section 3 of this act shall be entitled to: (c) receive a fair and impartial hearing before the board within fourteen (14)

days from the date of receipt of the notice from the employee requesting a hearing."

The appellant had twice requested in writing a formal hearing - his first request is acknowledged and denied in the superintendent's letter of April 4, 1974. Again on April 12, 1974, appellant's former counsel requested a formal hearing. The superintendent responded to this last letter by letter dated May 3, 1974, setting a hearing on May 21, 1974. Although the hearing was continued by agreement until June 3, 1974, the May 21, 1974, setting was already untimely under the act because it was given more than fourteen (14) days beyond the date of the request no matter from which date the count is begun:

(a) If we count from the date of the superintendent's April 4, 1974, letter, it was forty-seven (47) days until the May 21,

1974 setting.

(b) If we count from the date of appellant's counsel's letter of April 12, 1974, it would be thirty-nine (39) days.

(c) If we count from the effective date of the act, April 25, 1974, it was twenty-six (26) days.

Section 5(c) gives a right to a hearing within fourteen (14) days from the receipt by the school board of the employee's request.

IV.

In view of the above ruling the Court does not pass upon nor decide the question as to whether or not the reasons given for not re-hiring the appellant were sound or of sufficient magnitude and/or import, if proven, to substantiate the school board's decision in this case.

V.

The decision of the school board - appellee will be reversed and an order entered in this cause that the appellant be offered a contract of employment for the 1974-75 school year at the regular salary for his status.

VI.

Counsel for appellant will prepare a decree in accordance with the ruling announced herein and submit the same to the Court for signature after having first secured approval as to form of opposing counsel. The costs of this action will be assessed equally between the appellant and the appellee in this cause.

VII.

The original of this opinion of the Court has this day been filed with the Clerk of the Chancery Court of Harrison County, Mississippi, First Judicial District, for

inclusion among the papers in this cause in conformity with the Rules in Chancery.

August 26, 1974.

/s/ Frank W. Alexander
CHANCELLOR, Division II.

FEBRUARY 17, 1976

IN THE SUPREME COURT OF MISSISSIPPI

NO. 48,527

BOARD OF TRUSTEES OF THE
PASS CHRISTIAN MUNICIPAL
SEPARATE SCHOOL DISTRICT

VS.

WILLIE C. ACKER

BEFORE INZER, SMITH AND SUGG

SMITH, JUSTICE, FOR THE COURT:

Acker, a school teacher, appealed to the Chancery Court of Harrison County from the action of the Board of Trustees of the Pass Christian Municipal Separate School District which had declined, following a hearing, to re-employ him. The hearing had been granted by the board under the provisions of the Mississippi Public School Fair Dismissal Act (Mississippi Code Annotated, Sections 37-9-101 through 37-9-113 (1972), which became effective April 25,

1974.)

On April 12, 1974, prior to the effective date of the act, Acker, through his counsel, requested a hearing before the school board. Previous requests had not been granted. On April 25, 1974, the Public School Fair Dismissal Act became effective. In the light of the new act, the board granted Acker's request for a hearing and set May 21, 1974, as the date, apparently because a Court Reporter would be available to take the testimony at that time. Acker was notified by letter May 3, 1974. But at the request of Acker, through his counsel, a continuance was granted and the hearing reset for June 3, 1974. The hearing was conducted, the board declined to re-employ Acker and he appealed, as provided in the act, to the Chancery Court of Harrison County.

The record of the evidence adduced at the hearing before the board was duly transmitted to the Chancery Court in its appellate role. When the case came on for hearing before the Chancellor a hearing de novo was granted as required by the terms of the statute. However, the Chancellor overturned the school board's action and ordered Acker's re-employment basing his decision on the proposition that there had been a departure by the board from procedures set up in the Public School Fair Dismissal Act. From this action on the part of the Chancery Court the board has appealed here. While Acker's appeal from the board's action was pending in the Appellate Court (Chancery Court) he filed in the appeal case a new and original action seeking, among other things, damages from the school board. On motion, the Chancellor dismissed

this bill and from his action in doing so, Acker has cross-appealed.

Dealing first with the cross-appeal, we hold that the Chancellor correctly refused to permit the filing of a new and original suit in the pending appeal case and in striking the bill. The case, on cross-appeal, is affirmed.

On direct appeal, it is urged on behalf of Acker that the failure of the board to comply with procedural requirements of the Public School Fair Dismissal Act, including its failure to act within seven days as provided in the act, was fatal to the board's power to confirm the decision not to re-employ him. The enactment of the new statutory procedures which became effective in the course of the dealings between Acker and the school board, which already were in progress, in the absence of

a showing of bad faith, requires that some indulgence be granted the board in its efforts to comply administratively with the requirements of the new statute.

On May 21, 1974, Acker, through his counsel, requested that the matter be continued, this was granted and the hearing was reset for June 3, 1974. It appears, therefore, that a considerable part of any resulting delay was occasioned by Acker himself. We do not think, under the peculiar circumstances of this case, and in the absence of a showing that any substantial actual prejudice resulted, that there was such a departure from statutory procedure as to deprive the board of its power to act.

The case must be reversed, however, on direct appeal and be remanded to the Chancery Court in order that the case may be

properly dealt with as an appeal from the action of the Board of Trustees, an administrative body. The Chancery Court, in its role as Appellate Court, is limited in cases such as this to a review of the record made before the administrative agency, in this case the Board of Trustees, for the purpose of determining from such record whether the action of the school board was or was not:

(1) Supported by substantial evidence,

(2) Arbitrary or capricious,

(3) Beyond the power of the administrative agency to make, or

(4) In violation of some statutory or constitutional right of the complaining party. (Mississippi State Tax Commission v. Mississippi-Alabama State Fair, 222 So.2d 644, 665, 666 (Miss. 1969)).

Under a provision of the Public School

Fair Dismissal Act, contained in Mississippi Code Annotated Section 37-9-113 (1972), it is sought to require that the hearing on appeal from the board to the Chancery Court "shall be de novo." This violates the Mississippi Constitutional separation of powers. In Mississippi State Tax Commission v. Mississippi-Alabama State Fair, supra, this Court said:

> Our Constitution does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies. Our Courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited one, however, since the Courts cannot enter the field of the administrative agency. The Court will entertain the appeal to

> to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. This rule has been thoroughly settled in this state. See Loftin v. George County Board of Education, 183 So.2d 621 (Miss. 1966); City of Meridian v. Davidson, 211 Miss. 683, 53 So.2d 48 (1951); California Co. v. State Oil & Gas Board, 200 Miss. 824, 27 So. 2d 542 (1946); suggestion of error overruled, 200 Miss. 824, 847, 28 So.2d 120 (1946). (222 So.2d at 665, 666).

On direct appeal the case will be reversed and remanded to the Chancery Court for a review of the record made at the administrative hearing before the Board of Trustees. On cross-appeal the action of the Chancellor in dismissing the original bill filed in the appeal proceedings is affirmed, such dismissal, however, being without prejudice to the right to refile

in the proper tribunal.

ON DIRECT APPEAL REVERSED AND REMANDED, ON CROSS-APPEAL AFFIRMED.

GILLESPIE, C.J., PATTERSON, P.J. INZER, P.J., ROBERTSON, SUGG, WALKER AND BROOM, JJ., CONCUR.

NOVEMBER 30, 1976

IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

IN VACATION 1976

WILLIE C. ACKER	APPELLANT,
VS.	NO. 65,295,
BOARD OF TRUSTEES OF THE PASS CHRISTIAN MUNICIPAL SEPARATE SCHOOL DISTRICT	APPELLEE.

OPINION OF THE COURT

This cause is before this Court on remand from the Mississippi Supreme Court in Board of Trustees of the Pass Christian Municipal Separate School District v. Acker, 326 So. 2d 799 decided February 17, 1976. Said cause having been "reversed and remanded to the Chancery Court for a review of the record made at the administrative hearing before the Board of Trustees."

The Supreme Court, in addition to holding the "de novo" section of the "Fair Dismis-

missal Act", Section 37-9-113 of the Mississippi Code of 1972, unconstitutional and limiting this Court's role to a review of the record made before the school board, also ruled that there was no departure from the statutory procedure as to deprive the school board of its power to act, stating "in the absence of a showing of bad faith, requires some indulgence be granted the board in its efforts to comply administratively with the requirements of the new statute." "We do not think, under the peculiar circumstances of this case, and in the absence of a showing that any substantial actual prejudice resulted, that there was such a departure from statutory procedure as to deprive the board of its power to act."

This Court previously held (Opinion dated August 26, 1974) that it was of the

opinion that the school board failed to follow the law in the particulars discussed and that their decision to dismiss the appellant in this case must be reversed procedurally if for no other reason, and that the Court did not pass upon nor decide the question as to whetheror not the reasons given for not re-hiring the appellant were sound or of sufficient magnitude and/or import, if proven, to substantiate the school board's decision in this case.

Pursuant to the remand this Court has now completed an exhaustive review of the record made at the administrative hearing before the Board of Trustees and finds as follows:

1. That the Chancery Court, in its role as an Appellate Court, is limited in cases such as this to a review of the record so made before the administrative agency (school board), for the purpose of deter-

mining from such record whether the action of the school board was or was not:

(1) Supported by substantial evidence,

(2) Arbitrary or capricious,

(3) Beyond the power of the administrative agency to make, or

(4) In violation of some statutory or constitutional right of the complaining party.

2. That it is not within this Court's power to determine whether or not the reasons given were sufficient to refuse to renew the appellant's teaching contract but only to determine if any of the above requirements were violated.

3. That this Court is of the opinion and so finds that the appellee (school board) acted neither arbitrarily nor capriciously in this matter, did not unlawfully or unconstitutionally violate the rights of

others or the complaining party, and acted within its powers in not renewing appellant's contract, and that its decision not to renew appellant's contract was based upon and supported by substantial evidence.

4. That since this Court finds no prejudicial error in its review of the record made at the administrative hearing before the Board of Trustees, the action of said board in not renewing the appellant's contract will be affirmed.

5. All costs of this action will be assessed equally between the appellant and appellee in this cause.

6. Appropriate decree may be prepared by counsel for appellee (school board) in line with the ruling announced herein and submitted to the undersigned Chancellor for signature after the same has been approved as to form by opposing counsel.

7. The original of this Opinion of the Court has this day been filed with the Clerk for inclusion among the papers in this cause in accordance with the Rules in Chancery.

November 30, 1976,

/s/ Frank W. Alexander
CHANCELLOR, DIVISION II

Page 292 Miss. 357 Southern Reporter, 2d Series

WILLIE C. ACKER

VS.

BOARD OF TRUSTEES OF PASS CHRISTIAN MUNICIPAL SEPARATE SCHOOL DISTRICT.

NO.: 51053.

Supreme Court of Mississippi.

March 8, 1978.

Rehearing Denied April 26, 1978.

Appeal from Chancery Court, Harrison County; Frank Alexander, Chancellor.

Gerald Blessey, Paul S. Minor, Biloxi, for appellant.

Jason H. Floyd, Jr., Gulfport, for appellee.

Before SMITH, P.J., ROBERTSON and LEE, JJ., and FRED P. WRIGHT, Commissioner.

AFFIRMED.

May 3, 1978

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIE C. ACKER	APPELLANT
VS.	NO.: 50,153
BOARD OF TRUSTEES OF THE PASS CHRISTIAN MUNICIPAL SEPARATE SCHOOL DISTRICT	APPELLEES

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

GERALD BLESSEY

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Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIE C. ACKER	APPELLANT
VS.	NO.: 50,153
BOARD OF TRUSTEES OF PASS CHRISTIAN MUNICIPAL SEPARATE SCHOOL DISTRICT	APPELLEES

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Willie C. Acker, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Mississippi Denying the Petition for Rehearing.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ Gerald Blessey
GERALD BLESSEY, Attorney for
Willie C. Acker, Appellant

BLESSEY & MINOR
Attorneys at Law
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Biloxi, Mississippi 39533
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CERTIFICATE OF SERVICE PER RULE 33(3) (b) OF THE SUPREME COURT OF THE UNITED STATES

I, Gerald Blessey, one of the attorneys for Willie C. Acker, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of May, 1978, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the appellee by service upon the Honorable Jason Floyd, Jr., as attorney for the Board of Trustees of the Pass Christian Municipal Separate School District, by mailing a copy to him in a duly addressed envelope with first class postage prepaid to his address at Post Office Box 1107, Gulfport, Mississippi 39501.

/s/ Gerald Blessey
GERALD BLESSEY,
Attorney for Willie C. Acker, Appellant

BLESSEY & MINOR
Attorneys at Law
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Supreme Court, U. S.
FILED
OCT 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78, 123

WILLIE C. ACKER,

Appellant.

VERSUS

BOARD OF TRUSTEES OF
PASS CHRISTIAN MUNICIPAL
SEPARATE SCHOOL DISTRICT.

Respondents.

On Appeal From the Supreme Court of Mississippi

MOTION OF APPELLEE TO DISMISS APPEAL

W. JOEL BLASS
Mize, Thompson & Blass
Post Office Box 160
Gulfport, Mississippi 39501

ATTORNEY FOR APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78, 123

WILLIE C. ACKER,

Appellant,

VERSUS

BOARD OF TRUSTEES OF
PASS CHRISTIAN MUNICIPAL
SEPARATE SCHOOL DISTRICT,

Respondents.

On Appeal From the Supreme Court of Mississippi

MOTION OF APPELLEE TO DISMISS APPEAL

Comes now the Appellee and moves that this appeal be dismissed upon the grounds that no substantial federal question is presented by it. This appeal is taken from a decision of the Supreme Court of Mississippi upon the second appearance of this case before it. Shortly before the end of his contract for the current year, in 1974, the Appellant was notified by his Principal that he would not be recommended for a new contract. He had appealed to the Chancery Court of Harrison County, Mississippi from action of the Board of Trustees, following a hearing, in declining to override the Principal and order his re-employment. The hearing was granted by the

Board under the provisions of the Mississippi Public Schools Fair Dismissal Act (Miss. Code Annotated, Sections 37-9-101 through 37-9-113, 1972) which became effective April 25, 1974. On April 12th, before the effective date of the act, Appellant had requested a hearing which was denied. On April 25, 1974, the new statute became effective and, in the light of the new act, the Board granted Appellant's request for a hearing and set May 21, 1974 for it. Appellant was notified by letter dated May 3, 1974. Upon the appointed date, he appeared through counsel, newly employed that day, and a different attorney from his original counsel, and requested a continuance which the Board granted, setting the new date for June 3, 1974. After the hearing, the Board declined to order his re-employment and he appealed to the Chancery Court of Harrison County, Mississippi, de novo, as the statute then provided. The Chancery Court held that there had been procedural errors under the act and ordered the re-employment of Appellee. From this, the Board of Trustees appealed and the Supreme Court of Mississippi reversed and remanded upon the ground that a de novo hearing before the Chancery Court from the administrative hearing violated the Mississippi concept of separation of powers and that the Chancery Court was limited to determining whether or not the order of the administrative agency was supported by substantial evidence, was arbitrary or capricious, was beyond the power of the administrative agency to make, or violated some statutory or constitutional right of the complaining party. The Chancery Court heard the matter again, within these limits, and affirmed the action of the Board. The Appellant again took the matter to the Supreme Court of Mississippi where it was affirmed on March 8, 1978 and rehearing was denied on April 26, 1978. No opinion was written on either of these last two actions.

I.

THE VALIDITY OF THE STATUTE IS NOT GENUINELY DRAWN INTO QUESTION IN THIS CASE.

Appellant takes the position that the statute was unconstitutional because it did not set out every requisite for due process which the Courts have enunciated. Upon its face and very clearly, the statute requires that "the hearing shall be conducted under rules of the Board which shall embody due process of law and fairness for both parties." There is nothing wrong with the statute and we think that the legislature may be forgiven for simply stating that the hearing shall be fairly held and due process accorded to both parties. If due process has not been accorded, it is not the fault of the statute.

Appellant complains that the statute failed to grant the School Board power, after a hearing, to overrule the Principal's failure to recommend the teacher for a new contract. The Mississippi Supreme Court has since addressed that point and has held that that is not the proper interpretation of the statute. ***Lamar County School Board v. Saul,*** 359 So.2d 350 (Miss. 1978). The statute, as construed by the Mississippi court, is not, therefore, deficient in this respect. Appellant also complains that the statute fails to require a pretermination hearing, but it is clearly not defective on this point for the reason that it is dealing with a question of a failure to renew a contract, rather than the termination of an existing contract, and set in the time frame of the school year, the hearing would normally take place prior to the end of the semester in which the teacher is actually engaged. There would, therefore, be and there has been no interruption of the teacher's employment, even to this very day.

Appellant complains that the statute fails to require the School Boards, after a hearing, to state in a written notice to the teacher the reason for the decisions not to override the

Superintendent or the Principal. While this might be the better practice and perhaps should be done in most cases, the statute certainly is not faulty for not spelling out such a requirement. We fail to see how the Appellant could be harmed, in any event, because the issues were not complicated and the reasons for the Board's action are evident from a reading of the record.

Next the Appellant complains that the statute permits School Boards to hear cases in which the Board members either have a personal interest or some conflict, bias or prejudice. That statement is obviously not true and the language of the act above quoted clearly refutes it. In the same paragraph of his Jurisdictional Statement, the Appellant complains that the act fails to state any measurable standard for renewal of teacher's contracts by which the substantiality of the evidence can be tested, but we know of no requirements that this be set out in the statute, particularly in view of the interpretation the statute has received from the Supreme Court of Mississippi. ***Lamar County School Board v. Saul, supra, Calhoun County Board of Education v. Hamblin,*** 360 So.2d 1236 (Miss. 1978).

The remaining attacks made upon the statute are that it permitted an administrative agency to exercise the judicial function and that it failed to prohibit the attorney for the Principal from serving as counsel for the School Board during the conduct of the hearing. The allegation with regard to the administrative agency exercising the judicial function does not, in our judgment, require an answer. Every administrative agency must, at some times, make decisions which affect individuals under its jurisdiction. If every such decision were taken away from administrative bodies and turned over to the courts, the courts would simply be unable to handle them.

The Appellant further objects that counsel for the Board also represented the Principal of the school at the hearing and argues, for this reason, that the statute is unconstitutional.

The statute does not reach this point and certainly does not require this procedure. The act says that the hearing shall be fair and that due process shall be afforded. The record in this case discloses that counsel for the Principal was scrupulously fair in his behavior at the hearing. It is not possible to find in this record any instance where it could truthfully be said that counsel took any advantage of his position to the injury of the Appellant.

Further, with reference to the dual role of the School Board attorney, Appellant cites several cases, but none of them is in point. The School Board attorney's behavior was so exemplary, the Appellant's attorney was moved to write, in his Brief to the Mississippi Supreme Court that:

> "The Appellant ***does not*** suggest that the Board's attorney acted in any way unethically or unprofessionally. It is submitted, however, that his actions were contrary to the current standards of lawful due process."
> (Emphasis from the original)

However this may be, it is clear that the statute did not require this procedure and this objection does not address itself to the validity of the act.

The remainder of Appellant's attack upon the statute simply complains of various things which are not addressed by the act. On page 32 of his Jurisdictional Statement, Appellant says:

> "The real decision by the School Board was made summarily and secretly on March 24, 1974 (R. 68) long before the hearing."

That statement is false and the whole record shows it. At the time of the action at Record 68, the Board felt that it had no

authority to act, and the merits of the controversy were clearly not before it. The quoted statement is typical of the collection of loose comments which characterize the Jurisdictional Statement. The money now being spent on the refutation of such charges, unsupported by the record, could be better spent on raising teachers' salaries and additional books and supplies to improve the quality of education in Mississippi's schools.

At page 33 of his Jurisdictional Statement, Appellant complains that he was given two additional statements as to reasons for the non-renewal of his contract. He asked for the reasons and they were given to him. This was the first time the law required the reasons to be given. The record makes it amply clear that the reasons were those which prompted the Principal to withhold his recommendation for new employment (R. 19 - 28), and that the "accusation" came from the Principal. There were only four reasons given, all coming from the Principal, and all were amply established by the record; all simple and easy to understand. Again, none of these complaints were caused by any defect in the statute, and an appeal based upon constitutional infirmity in the statute must fail.

Whether or not the foregoing litany of complaints will move the Court to grant certiorari is another question but, at this point, it is appropriate to observe that Appellant, nowhere, shows how he has been damaged or treated unfairly in fact. He uses language like "not advised at all in sufficient detail." "How can one show error when one does not even know the source of the accusation?" An accusation is true or false, or true in part and false in part, regardless of the source, and Appellant was advised in detail as to the reasons which prompted the Principal not to recommend renewal of his contract. (R. 66)

Before going into the next point, we wish to observe that Appellant does not state, anywhere in the Jurisdictional

Statement, that the Board reached an erroneous conclusion; that an impartial Board would have reached a different one; that the evidence presented was not true; that he was denied the right to put on any proof he wanted to introduce; or that he suffered any actual injury in fact. Having no real injury to complain of, he tries very hard to find technical violations of procedural rules, and makes harsh accusations against the Board members, accusing them of bad faith, lying under oath, being biased and prejudiced, having a "stake" in the outcome (not specifying what the "stake" is; (Jurisdictional Statement, p. 44) Yet, he invoked the hearing before the Board; went ahead with it after voir dire and after his objections were overruled; did not, at that point, raise the question of the validity of the statute.

II.

THE APPELLANT WAS NOT DENIED ANY RIGHTS BY REASON OF THE FAILURE OF RESPONDENT TO EMPLOY SPECIAL COUNSEL AS PROSECUTOR.

There was no "prosecutor" in this case. The record discloses, nowhere, any evidence that the *Board* acted in a dual role. What happened in this case is entirely consistent with the teachings of *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed.2d 287, 90 S.Ct. 1011 (1970); *Ferguson v. Thomas*, 430 F.2d 583 (Fifth Cir. 1970) and *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed.2d 811, 88 S.Ct. 1731 (1968).

On the issue of the dual role of the attorney for the Board, we agree that it is better to have a different attorney advise the Board during the hearing, but, in this case, we invite attention to the scrupulously fair behavior of the Board attorney as reflected by the record. Nothing similar to the *Miller* facts occurred, *Miller v. Board of Education*, 200 N.E. 2d 838, 51 Ill,

App.2d 20 (1964). *Mack v. Florida State Board of Dentistry*, 430 F.2d 862 (Fifth Cir. 1970), is not remotely in point. But, even there, the Fifth Circuit said, at page 864, that the hearing there was not a hearing, but an ungoverned confrontation. It suggested the employment of separate counsel but said: "We do not intimate that such a procedure is constitutionally required." None of the cases cited in the Jurisdictional Statement, p. 35, support the rule contended for in this case. All of the cited cases show highly objectionable conduct and obvious unfairness. There was no such conduct here.

To contrast the behavior of the Board's attorney in this case from those which Appellant has cited, we think it is appropriate to look at the several examples of the Board attorney's actions set out in the Jurisdictional Statement, commencing on page 36.

First, the Appellant says that the Board's attorney instructed the Board regarding voir dire, and cited Record, p. 15. Reference to the record shows that Mr. Blessey, Appellant's attorney, explained that he would like to voir dire the Board. Mr. Floyd, the Board's attorney, said:

> "You are sitting as a jury. The legal term, voir dire, means Mr. Blessey wants to ask you some questions concerning your knowledge and involvement with this particular case at this point, and I think it's proper procedure that you should submit to."

Mr. Blessey then proceeded to question the Board.

The second complaint is that he defended the Board's activities at previous meetings as described in the voir dire, citing Record, page 17. There Mr. Floyd is shown to have said:

> "To clarify, the meeting of the Board last Wednesday was to go over the procedure for this hearing tonight and to hear the reading of the formal charges. Will everybody say that's true?"

No objection was made by Mr. Blessey at that time.

His third complaint is that Mr. Floyd responded to objections to the proceedings entered by Mr. Blessey before the Board and advised the Board on how it should rule on the questions. This appears in Record, pages 19 and 20. At that ime, Mr. Floyd said:

> "We met here in this Board room a week ago, at which time Mr. Acker appeared with his counsel, who is a different counsel from the one I had been corresponding with before, at which time a lot of things were first requested of this School Board, and at which time immediately thereafter they were supplied. Under the new Mississippi law, being Senate Bill No. 2108, this information should be delivered to Mr. Acker and his counsel upon request. I don't feel that this body at this point can decide that the Mississippi law should be subjected to a ruling of a federal case, with which I am not familiar . . . I am going to look it up later. Therefore, I feel that all these objections and requests by counsel of Mr. Acker should be forsaken at this time and proceed with this hearing, and whatever merit is to any of them they can be brought up at a later date if necessary. So I would respectfully submit that this Board overrule his objections, that they be preserved for the record and lets continue with the hearing."

The record shows no further comment by Mr. Blessey.

The fourth complaint is that he called witnesses and examined them on direct examination on presenting the Principal's case against the teacher, citing Record, pages 20 to 50. A reference to this part of the record shows a simple inoffensive and dispassionate examination of the witnesses. It does not show any hostility, any discourtesy, or any unfairness in any way whatsoever.

The fifth objection is that the attorney advised the Board about taking a recess, citing Record, page 34. A reference to that page shows that the Board had raised the question about whether to proceed further into the evening. Evidently, two members wanted to vote on whether to extend the time, and the Board Chairman said: "If it's agreeable with the two attorneys, I will ask for a vote. " Mr. Floyd stated: "We are not going to object to that." And Mr. Blessey responded: "I am almost finished." Mr. Floyd then said: "We should finish with this witness. We can consider a recess after he is finished." Mr. Floyd further said: "We may wind up in half an hour to forty-five minutes." And Mr. Blessey commented: "I don't think we are that far from finishing." It is obvious that Mr. Floyd was cooperating with Mr. Blessey in an effort to permit him to continue. Certainly that was not unfair.

The sixth complaint is that Mr. Floyd has written a letter earlier, for the Board, giving the written reasons for nonrenewal, citing Record, pages 55 and 56. An examination of those pages of the record shows a letter from Mr. Floyd addressed to Mr. Acker dated May 24th, where Mr. Acker was advised that meeting date for the hearing had been reset for Monday, June 3rd, giving the time and place and containing this statement: "This setting meets the approval of your attorney, Mr. Gerald Blessey." Attached to the letter was the list of reasons why Mr. Acker was not recommended for reemployment. The letter concludes: "I am forwarding a copy of these reasons to Mr. Blessey along with a copy of this letter." We see nothing unfair or improper in the attorney for

the Board's having written this letter.

The seventh item complains that Mr. Floyd objected to a Motion to strike and says that he "allowed the Board to continue without ruling on the Motion." An examination of these pages shows that Mr. Acker had testified that he had earlier given a different reason for his use of the ladies' restroom than the one which he gave to the Board that night. Mr. Blessey moved to strike the questions and the answers regarding the earlier meeting on the ground that improper procedure was followed. Mr. Floyd stated: "I object to that being stricken . . . it's an admission by him . . . it doesn't have to be under oath, which he admitted to making." No one ruled upon Mr. Blessey's Motion and the record does not show that Mr. Blessey insisted or again requested a ruling. Certainly, it cannot be said that Mr. Floyd "allowed the Board" to continue without ruling on the Motion. There is an implication that Mr. Floyd was in charge, and the tenor of the whole record clearly shows that he was not.

The eighth objection is that Mr. Floyd advised the Board on how and when they could decide the case, citing Record, page 66. At that point, both sides had rested and the record shows that Mr. Blessey announced that Mr. Acker waived the requirement of decision within seven days and urged the Board to take more time to study the record. After closing statements, Mr. Barnes said: "We will wait until we receive the transcript." Mr. Floyd then said: "You can. You don't have to have it to make up your mind. You don't have to take it up in seven days either. Mr. Acker has waived the requirements." Again this was obviously in cooperation with Mr. Blessey to allow the Board to take such time as it needed to come to its decision. Certainly there was no unfairness shown here.

His ninth objection is that before the hearing, Mr. Floyd had participated in giving the Board advice on legal problems associated with the case and he cites a number of record pages.

None of them show the slightest impropriety or the slightest unfairness or prejudice to Mr. Acker in any way. It is true that earlier it was his opinion and the Board's opinion that they had no authority in the matter but, with the new statute, this was changed and immediately a fair and full hearing was afforded. The record is devoid of any indication of any evidence the Appellant sought to put on being declined, and it is wholly devoid of any overriding or overreaching on the part of counsel for the Board or of the Board itself, Counsel for Appellant proceeds to discuss ***Morgan v. United States***, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, 58 S. Ct. 999, (1937), discussing the delegation to the attorney for the prosecution of the task of preparing the decision. We are unable to understand the reason for the citation of that authority because there is no suggestion of such practice in this case.

As we have stated earlier, it would, perhaps, have been better to have someone else advise the Board during the hearing. If this had been done, however, it would have been more costly and counsel would still have raised the question of the fact that Mr. Floyd had probably discussed the matter with the Board earlier with respect to the procedures and he would have raised the same question. To escape the question entirely, two new lawyers would be required. We think that it should be kept in mind that the hearing before this School Board is not required to be a full blown trial, and that so long as the hearing is conducted honestly and fairly and the complaining employee is afforded a full opportunity to present matters which he feels will support his position, and as long as he is allowed a full opportunity to cross examine those who are brought in in opposition to him, and so long as he is not surprised with new charges which were not given him beforehand with a summary of the evidence which is expected to support them, then the requirements of due process in such cases have been met. We invite attention to the language of Appellant's counsel (R. 19) where it is stated:

> "I acknowledge for the record that Mr. Floyd has supplied me the names and the nature of the testimony of the witnesses in the past seven days, but this was too late to enable Mr. Acker to have a meaningful opportunity to confront these issues before an impartial tribunal."

An examination of the record and the testimony shows that there was no complexity about it, that the issues were simple and clear cut and that Mr. Acker did have and took full advantage of the opportunity to prepare his case.

III.

THE ALLEGATION THAT THE RESPONDENT BOARD WAS NOT AN IMPARTIAL DECISION MAKER IS WHOLLY WITHOUT SUPPORT IN THE RECORD.

On page 41 of the Jurisdictional Statement, the Appellant cites several cases where it is held that the hearing authority should be impartial. This is certainly not a novel proposition. There is nothing in this record, however, that supports his allegation that the Board was other than impartial in this case. A reference to the record, at pages 52 and 68, shows that the Board was at first under the impression that it did not have authority to enter into a contract with the teacher without the recommendation of the Principal and, therefore, considered a hearing useless. This was an erroneous conclusion but not a surprising one in view of the state of decisions at that point. As soon as the new law went into effect, however, the Board acted very promptly and very properly to afford the Appellant the hearing he requested. Appellant contends that, on voir dire, they admitted that they had discussed the case with the Superintendent and, possibly, the Board's attorney before the June 3rd meeting. A reference to record, pages 15 and 16, shows that

Mr. Barnes, President of the Board, stated that he did not recall discussing the facts of the case with anyone; had talked to no witnesses, had formed no opinion, and could judge it purely on the facts presented. He had not seen the letter stating the reason for Mr. Acker's non-renewal. He had talked some about it the week before after the case was continued. On page 16, Mr. Benvenuti said that he had not discussed the reasons for non-renewal until the meeting at which the case was postponed. He had seen the report in the paper but stated that he could judge the case impartially based on what he had heard at this hearing; that he had not talked with the Principal about it and talked only with the Superintendent at the last meeting when he heard the charges. Mr. Necaise said that he had first discussed the case at the last meeting when the hearing was postponed; did not see the newspaper story; had talked with no witnesses or anyone else; that he could sit impartially.

Mr. Stallings stated that he had first talked about the case, the week before, (when the hearing was postponed) and stated that he could sit and judge impartially in the matter. Mr. Harshburger stated substantially the same thing and he said that he could sit impartially. It was at this point that Mr. Floyd stated that the meeting of the Board mentioned was the one held to go over the procedure for the hearing and to hear the reading of the former charges. The Board members said that that was correct. (R. 17) Mr. Benvenuti said that they talked about the procedure and went home. On page 42 of the Jurisdictional Statement, Appellant makes reference to Record, pages, 68, 71, 73, and 74, and seems shocked by what is reflected in those minutes. He says that these minutes contradict each of the Board member's testimony. This statement simply is not true. A reference to those record pages shows nothing except the first conception of the Board that they could not hold a meeting and then reflects receipt of a charge of employment discrimination received from EEOC, showing that the matter should be referred to the attorney for study. They then

go on to show a determination that a hearing should be held, with a court reporter available and setting a date for the hearing. Obviously, Appellant is trying to torture the language of the Board on voir dire. Mr. Blessey asked the Board questions directed at whether or not they could sit impartially and they answered that they could. There is nothing whatsoever in the record to indicate that these statements were not made in the utmost good faith, nor is there anything to show that the Board behaved in anywise improperly, nor is there any evidence of bias prejudice or prejudgment. This is another illustration of the desperation of Appellant in his effort to make himself appear to have been mistreated when, in fact, he has received every fair consideration. Counsel says that the testimony of the Board strains one's credibility. We say in response that it is becoming increasingly difficult to persuade citizens to serve on Boards such as this. The job is a thankless one, certainly not remunerative, and no matter how hard the members strive to do their duty honestly and fairly, their motives are questioned and their integrity is impuned.

On page 43 of the Jurisdictional Statement, counsel seems to take offense at the fact that it was called to the Board's attention that Mr. Acker had given them a different impression at an earlier meeting as to his use of the ladies' restroom. This does not, in any way, indicate that the Board had made up its mind or had discussed the matter still, except as to the procedures, and although Mr. Acker may have made some statements to them at the time, it is certainly clear from the whole record that there was no general discussion to such a degree as to in anywise cause the Board to make up its mind beforehand. If there had been, certainly Mr. Acker's counsel would have brought it out at this hearing.

Counsel objects again, on pages 43 and 44 of the Jurisdictional Statement, that the Board failed to discuss objections and rule on a Motion by Acker's counsel. This happens

everyday in a thousand courts throughout the nation and it is the duty of counsel to insist upon the ruling on a Motion unless he waives it. Every lawyer is familiar, also, with the procedure in the courts everyday where an objection is made and the Court simply says "overruled" or "sustained" with no comment and no discussion. No inference can be drawn from this.

At page 44 of the Jurisdictional Statement, he speaks of the personal stakes by the Board and its attorney in the reasons for non-renewal and again cites Record instances (R. 55, 56, 68, 71, 73, 75, and, again 52). We confess that we are totally at a loss as we attempt to follow the reasoning of counsel for the Appellant at this point. All of the record pages cited simply show the consideration of the Board of the question of whether or not they could hold a hearing, and show the ultimate decision under the new statute they could, and show their prompt compliance with it. These discussions have nothing to do with the merits and they certainly do not show "lack of honesty in the Board" by not bringing these things up on voir dire. Much of the material shown on these record pages is actually favorable to Appellant or shows, at the very least, a strong desire to accord him every opportunity to make his defense. Again, we are wholly unable to follow counsel's reasoning in citing these instances as showing "the personal stakes" and the "personal bias" and the "prejudgment" of the Board, and we challenge and resent the language which says that these things show that the decision of the Board was "infected by bias and prejudgment not consistent with standards of honesty and integrity in due process . . .". Appellant's position on this point, as on the others, is all form with no substance.

IV.

THE RESPONDENT BOARD, FINDING NO REASON TO OVERRIDE THE DECISION OF THE PRINCIPAL NOT TO RECOMMEND RE-EMPLOYMENT, WAS NOT REQUIRED TO ARTICULATE THE REASONS FOR HIS DECISION. THE ISSUES NOT BEING COMPLEX AND THE REASONS BEING EVIDENT.

In this case, the duty rested upon the Appellant, at the hearing before the Board of Trustees, to show that the action of the Principal in failing to recommend a renewal of his contract was based upon impermissable reasons. ***Lamar County School Board v. Saul, supra; Calhoun County Board of Education v. Hamblin, supra.*** The issues were very simple and the facts were not complicated. Appellant, however, complained that the Board did not articulate the reasons which motivated it to decline to override the Principal's failure to recommend. He cites ***Goldberg v. Kelly, supra,*** on this point. It is true that the courts there stated that the decision maker should state the reason for his determination and indicate the evidence he relied on, though the statement need not amount to a full opinion or even formal findings of fact and conclusions of law. Appellant also cites ***Morrisey v. Brewer,*** 92 S.Ct. 2593, 33 L. Ed.2d 484, 408 U.S. 471 (1972). Appellant takes these opinions as prescribing an inflexible set of rules for administrative hearing.

In considering this point, we think that it should be remembered that, in ***Goldberg, supra,*** there was the question of terminating welfare payments to people otherwise destitute and in ***Morrissey, supra,*** there was the question of the revocation of parole and the reincarceration of the individual. In ***Morrisey, supra,*** however, the court said:

"It has been said so often by this court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands . . . its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." 92 S.Ct. at 2600.

At page 2604, the court says:

"We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any state's parole system."

In *Goldberg, supra*, there was, again, a very substantial and essential right involved, a more serious and essential right than in *Matthews v. Eldridge*, 96 S.Ct. 893, 424 U.S. 336 (1976) which involved the termination of social security disability payments. In *Goldberg, supra*, the court indicated that a hearing should be held before the payments were terminated and it said that the decision maker should state the reasons. The court does not say that, in every administrative hearing, due process is denied if the reasons are not stated in the decision. *Matthews, supra*, decided in 1976, discusses due process at some length and points out that the interest of the recipient of welfare disability payments are probably less pressing than the interest and needs of one who is receiving welfare. The court said, after discussing a number of its decisions:

"These decisions underscore the truism that ' " (d)ue process," unlike some legal rules, is not a technical conception with fixed content unrelated to time,

place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L. Ed.2d 1230 (1961). '(D)ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L. Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected . . . " .

In this case, it should be observed that the Appellant has not, down to this very date, missed one day's work nor has he suffered any loss of pay whatsoever. He is being continued in his employment at this time under an agreement between counsel and the Board and was continued in his employment under a writ of supersedeas through the proceedings in the Supreme Court of the State of Mississippi. The process provided in the statute makes provision for judicial review to determine whether or not the action of the Board was supported by substantial evidence or whether it was based upon some impermissable ground, and the court has found that it was not. It is significant that this Jurisdictional Statement makes no allegation that the decision was on any impermissable ground but confines itself solely to an attack upon the procedures which were followed and the allegation that the Board was not impartial. We respectfully submit that in a situation where the issues are as clearly stated and are as simple and easy to understand and where they are so amply supported by the evidence and where the individual involved has not suffered any interruption of his employment, and where judicial review has been had through the trial court, and the Supreme Court of the State of Mississippi, the fact that the School Board failed to render a written opinion outlining the evidence and its reasoning does not render the procedure so defective in due process as to violate the rights of the individual.

We stated earlier that the money spent in this matter could have been better spent to increase teachers' salaries and to provide additional educational materials for the use of the schools. This is a legitimate concern and has some bearing upon the extent to which this state is required to go in employing additional attorneys and then providing more elaborate procedures. In ***Matthews,*** cited above, 96 S.Ct. 893, 909, the court said:

> "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to societies in terms of increased assurance that the action is just may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since the sources available for any particular program of social welfare are not unlimited. See ***Frindley, supra,*** 123 U.P.A. L.Rev. at 1276, 1303."

A great deal more is said in ***Matthews, supra,*** which is applicable to the present case.

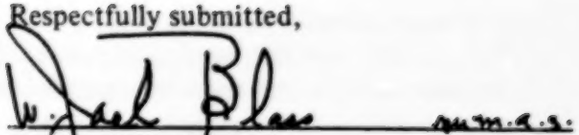
CONCLUSION

It is respectfully submitted that the record in this case, those portions cited by Appellant coming from the "abstract of record" filed with the Mississippi Supreme Court, clearly

and unequivocally refute the purported allegations of fact set out in the Jurisdictional Statement. This record reflects a scrupulous effort by the administrative body to be fair in every way. For the most part, the actions of the attorney for the Board at the hearing were actions taken in accord with and in conjunction with attorney for Appellant. Yet Appellant now complains of them. The record references to the actions of the Board do not show any prejudgment or bias but, on the contrary, show plainly and clearly, careful and scrupulous regard for the right of the Appellant. The record is so clearly contrary to the contentions made by Appellant that, but for high regard for Appellant's attorney, we would question his good faith and sincerity in lodging this appeal. As it is, we are constrained to believe that he is carried away by the spirit of advocacy and, for that reason, unable to glean from the record its clear and evident import.

The schools must be operated and someone on the scene must do it. If, in their honest effort to fairly perform their duties, the School Board fails to handle every case with the procedural wisdom of the highest courts, we respectfully suggest that they are entitled to some indulgence. This record shows that the Appellant has been afforded a hearing, postponed at his request, and that before the hearing, he was told what the charges were and he was informed as to the witnesses and their testimony. He was allowed to put on what proof he desired and was allowed to cross examine the witnesses and, indeed, to question the Board members themselves as to their qualifications. After being informed of the decision his case has been reviewed by the Chancery Court of Harrison County and by the Supreme Court of Mississippi to determine whether the decision of the Board was supported by the evidence, whether it was arbitrary or capricious, whether any statutory or constitutional right of the Appellant had been violated. We submit that he has had due process of law and that this appeal should be dismissed as an appeal and, if considered as a petition for a writ of certiorari, it should be denied.

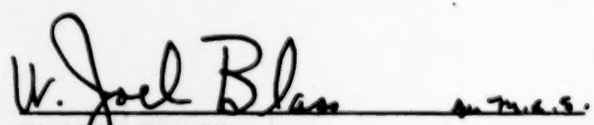
Respectfully submitted,



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CERTIFICATE OF SERVICE
PER RULE 33(3)(b) OF THE
SUPREME COURT OF THE UNITED STATES

I, W. Joel Blass, attorney for the Appellee herein, and a member of the Bar of the Supreme Court of the United States. hereby certify that, on the 9th day of October, 1978, I served copy of the foregoing Motion of Appellee to Dismiss Appeal by service on Honorable Gerald Blessey and Honorable Paul Minor, attorneys for the Appellant, by mailing a copy to them in a duly addressed envelope with first class postage prepaid to their address at Post Office Drawer L, Biloxi, Mississippi 39533.



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